

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF AND APPENDIX
FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7968

BRUCE LEE MELVIN AND ELNA A. SMITH
Appellants,

v.

FREDERICK G. PENCE, TRADING AS WASHINGTON
DETECTIVE AGENCY, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 7968.

BRUCE LEE MELVIN AND ELNA N. SMITH,
Appellants,

v.

FREDERICK G. PENCE, TRADING AS WASHINGTON
DETECTIVE AGENCY, *Appellee.*

BRIEF OF APPELLANTS.

JURISDICTIONAL STATEMENT.

The judicial proceedings in the present case originated in the District Court of the United States for the District of Columbia, where the appellee filed a Declaration claiming damages in the sum of Ten Thousand Dollars (\$10,000.00) against Bruce Lee Melvin and Elna N. Smith, growing out of an alleged action of malicious prosecution (Appellants' Appendix 1-5), and which ended in a verdict for the appellee on the 17th day of March, 1941, in the sum of Twelve Hundred Fifty Dollars (\$1,250.00).

The jurisdiction of the District Court of the United States for the District of Columbia is governed by Title 18, Chapter 3, Section 44 of the Code of Laws for the District of Columbia, and the appeal to this Court is governed by Title 18, Chapter 2, Section 26 of the Code of the District of Columbia, Complete to March 4, 1929, and known as the Acts of Feb. 9, 1893, 27 Stat. 435, c. 74, sec. 7; Mar. 3, 1901, 31 Stat. 1225, c. 854, sec. 226; Mar. 3, 1921, 41 Stat. 1312, c. 125, sec. 12).

STATEMENT OF THE CASE.

The appellee in his Declaration stated that on the 18th day of August, 1937, he was a duly licensed private detective, and that, by reason of certain false statements made to the Metropolitan Police Department by the appellants herein, the appellee's application for a private detective's license was refused him and it was necessary that he appeal to the Commissioners from the ruling, and that by reason of this action of the appellants he was required to expend the sum of Two Hundred Fifty Dollars (\$250.00) for an attorney's fee, in and about defending himself from the charges so wrongfully, unjustly, falsely, oppressively and maliciously made against him by said appellants.

To this Declaration there was filed an Amended Answer (Appellants' Appendix 6) in which the appellants denied all the material allegations of the Declaration and set up the truth of the allegations, and further that the statements to the police were privileged, and thereafter, before Mr. Justice Pine and a jury, the appellee produced testimony tending to prove that he had been a licensed detective since 1933, and that in the early part of August, 1937, he was employed by Mrs. Blanche Melvin to shadow the movements of Mr. Melvin, the appellant, and that on the morning of August 18, 1937, he accosted the appellants as they came out of an apartment on the third floor of 327 2nd Street, Northeast, and, when asked by the appellant, Elna N. Smith, to state who he was, he showed his badge but did not state who he was, nor tell her anything, and that the appellant

Smith again asked to see his badge, and the badge, with the name of F. G. Pence on the top line, with the eagle in the circular part of the badge surrounded by the words "Washington Detective Agency," was presented to the jury.

On October 26, 1937, appellee received a letter from the Commissioners' Secretary stating that this license as a private detective would not be renewed, based upon the recommendation of the Major and Superintendent of Police, and thereafter he employed an attorney, who arranged to have a hearing of his case before a Board appointed by the Commissioners, which was heard on the 15th day of December, 1937; that his license expired on the 1st day of November, 1937, and he received permission to operate near the latter part of November, 1937, for the time pending a final disposition of his appeal, which was granted on the 5th day of January, 1938.

The appellee further stated that from the time he was denied a renewal of his license to the time it was again granted to him that he did not sleep right, that he did not eat with any appetite and that it was almost impossible for him to describe the anguish he went through at that time, and that it continued for two months, and that the mental anguish and anxiety affected him physically, although he did not go to a physician and also kept his office open at all times to collect what money was coming in (Appellants' Appendix 17-18).

That this was all the testimony introduced by the appellee in the Court below to sustain the points raised in his Declaration, and at the close of the appellee's case the appellee, through his counsel, in open Court, stated that he would base his cause of action entirely on malicious prosecution committed by the appellants jointly, and the appellants moved for a directed verdict on the ground that the appellee had failed to introduce sufficient evidence to constitute, in law, an action for malicious prosecution, in that the appellee had failed to show that a judicial action had been instituted by the appellants against the appellee or that they had instituted a malicious civil or criminal prosecution

against the appellee, which said motion was overruled, and which was again renewed at the close of all the evidence in the case, and which was denied (Appellants' Appendix 18).

The Court presented the matter to the jury and instructed them, over appellants' objection, that they could consider damages for mental anguish and to the plaintiff's reputation, it being stated by counsel for appellants that there was no evidence to support these elements of damages (Appellants' Appendix 19).

After the judgment was entered in favor of the appellee, the appellants filed a motion to set aside the judgment entered therein and to enter judgment for the appellants or grant a new trial, setting forth the reasons therefor (Appellants' Appendix 8), which said motion was denied in a Memorandum Opinion filed by Mr. Justice Pine (Appellants' Appendix 9-11).

STATEMENT OF POINTS.

1. The Court erred in holding that appellee made out a case of malicious prosecution.

2. The Court erred in denying appellants' motions for a directed verdict at the close of the appellee's evidence and at the close of all the evidence introduced in the case.

3. The Court erred in denying appellants' motion to set aside the verdict and enter judgment for the appellants.

4. The Court erred in its instruction to the jury covering the reputation of appellee.

5. The Court erred in its instruction to the jury covering damages for mental anguish.

SUMMARY OF ARGUMENT.

1. The appellee based his entire case against the appellants upon malicious prosecution, and the law of the District of Columbia, supplemented by the decisions of substantial State Courts, holds that it is necessary that the plaintiff in

an action for malicious prosecution must show the commencement or continuation by the defendants of some judicial proceeding which terminated in his favor, and by reason of which he sustained certain damages, and where it was the institution of a civil suit that there must have been an arrest of the person or seizure of his property, and that the appellee in this case has failed to prove any of the necessary allegations of an action for malicious prosecution.

2. That the Court erred in submitting to the jury for their consideration the matter of damages to the appellee's reputation and also the matter of mental distress suffered by the appellee, for the record discloses that the appellee introduced no evidence covering reputation and no evidence covering mental distress which caused physical illness, and these were not proper elements of damages to submit to the jury.

ARGUMENT.

The Appellee Failed to Establish a Case of Malicious Prosecution and the Court Erred in Denying Appellants' Motion for a Directed Verdict and Their Motion to Set Aside the Verdict and Enter Judgment for the Appellants.

The statement of evidence filed herein (Appellants' Appendix 16-25) shows that the appellee had been licensed as a private detective since 1933, in accordance with Title 20, Section 1741 of the Code of Laws of the District of Columbia, being the Act of July 1, 1902, 32 Stat. 622, c. 1352, § 7; July 1, 1932, 47 Stat. 559, c. 336, par. 41, and that on October 26, 1937, he received a letter from the Commissioners, with the statement that his license as a private detective would not be renewed as of November 1, 1937, and that this refusal to renew his permit was based upon the recommendation of the Major and Superintendent of Police, and that the refusal of the Major and Superintendent of Police was based upon two affidavits filed with the Major and Superintendent of Police, in which it had been stated that the appellee had

interviewed the deponents on a domestic matter and had stated that he was from the Washington Detective Bureau, and that thereafter he had appealed to the Commissioners and a license was issued to him as of January 5, 1938. There was no evidence of any kind tending to show that the appellants had done anything other than to inform the police concerning the facts. The appellants instituted no judicial proceedings of any kind against the appellee, nor was the appellee interfered with in any way relative to his person or property.

In the case of *Auerbach v. Freeman*, 43 App. D. C., Page 176, this Court stated with approval the statement contained in *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459, that malicious prosecution was defined as a judicial proceeding instituted by one person against another, from wrongful or improper motives, and without probable cause to sustain it, and further, at Page 179, the Court said:

“Hence the distinction at common law between the action for false imprisonment and that for malicious prosecution. The former is a suit for trespass, and the latter an action on the case. The first can be maintained only when the arrest is made without legal process; and the latter, when the process of the law has been perverted and improperly used without probable cause and for a malicious purpose.

“In the present case, according to the evidence for the plaintiff, the arrest was for a petit larceny and without a warrant having been issued. In other words, under the facts stated, it was entirely without legal justification. No complaint was ever filed against the plaintiff, and there are no papers on file in the police court relating to the matter. How, then, can it possibly be contended that there has been a prosecution of the plaintiff? He has been arrested, it is true, and threatened with prosecution, but that is not enough to form the basis of this action. The machinery of the law must be set in motion in the regular way, or no prosecution has been instituted. In *Simmons v. Sullivan*, present term (42 App. D. C. 523), it was ruled that in an action for malicious prosecution it is incumbent upon the plaintiff to allege and prove ‘a discharge and termina-

tion of the criminal proceeding.' Here no criminal proceeding was instituted, and therefore there has been no prosecution, malicious or otherwise."

In the Memorandum of Justice Pine, in overruling the motion to set aside the verdict, he stated (Appellants' Appendix 10):

"The acts of defendants in this case were not equivalent to a suit brought against plaintiff by defendants in a civil action. Instead, they involved the making of statements to the police which might have resulted in a criminal prosecution, but which in fact were the basis for proceedings which resulted in the refusal on the part of the District authorities to renew the license of plaintiff as a private detective."

On this statement it is clear that there was no proof of the commencement by the appellants of any judicial action against the appellee but merely the making of certain statements to the police, upon which the renewal of the appellee's license was refused. There is no statement that the appellants knew that the appellee's license was in any way passed upon by the police, but merely that these statements were used by the police as a basis for their refusal to renew the license.

In *Holmes v. Peters*, 46 Apps. D. C. 260, which was an action for malicious prosecution, the plaintiff was imprisoned in the jail of the District of Columbia, awaiting a preliminary examination on the charge of forgery, and the defendant wrote a letter to the Judge of the Police Court, expressing the opinion that plaintiff was insane. The Judge, without issuing any process, had the plaintiff removed to the Washington Asylum for the Insane for examination, and he was found to be sane, and his case was dismissed. The Court at Page 261 said:

"Overlooking defective pleading apparent on the face of the declaration, the facts set forth are insufficient to support the cause of action plaintiff evidently sought to state. There is a charge that the statement made by the defendant is libelous, but none of the essen-

tial elements of the charge are set forth. Plaintiff, however, in his brief disclaims any attempt to set out a case of libel, but relies upon the sufficiency of the declaration to state a cause of action for malicious prosecution.

Plaintiff was not transferred to the asylum as the result of any legal process issued upon the letter of defendant; hence, the action of malicious prosecution will not lie. This case is ruled by *Auerbach v. Freeman*, 43 App. D. C. 176."

In *Wheeler v. Nesbit*, 24 Howard, 544, 4 U. S. 268, the Court at Page 271 said:

"To support an action for malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of prosecution and that the defendant was himself the prosecutor or that he instigated its commencement, and that it finally terminated in his acquittal."

To the same effect is the case of *Chapman v. Anderson*, 55 App. D. C. 164, 3 Fed. (2nd) 335, and which was referred to in the case of *Stauffer v. Brother*, the case decided by the South Dakota Supreme Court on June 11, 1940, 292 N. W. 432, 128 A. L. R. 925, in which it is stated that the elements of malicious prosecution are 1: Commencement or continuation of an original criminal or civil judicial proceeding; 2: Its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding; 3: Its bona fide termination in favor of the present plaintiff; 4: The absence of probable cause for such proceeding; 5: The presence of malice therein; 6: Damage conforming to legal standards resulting to plaintiff.

There was considerable question as to what type of action the appellee relied upon in the Trial Court, and at the close of the appellee's case, counsel for the appellee stated that they would base their cause of action entirely on malicious prosecution committed by the appellants jointly, and abandoned any other claim that they might have had under the Declaration.

In the case of *Auburn Automobile Company v. Habig*, 84 Fed. (2nd) 54, the Court, at Page 59, stated that the plain-

tiff conceded in his brief that in order to maintain the action of malicious prosecution it was necessary for him to prove the matters which have been previously set forth above.

In the case of *Peckham v. Union Finance Co. et al.*, 60 App. D. C. 104, 48 Fed. (2nd) 1016, an action for malicious prosecution, the Court said, at Page 105:

“In our opinion the greater weight of authority in this country and the better reasoning support the view that no action will lie for the recovery of damages sustained by the prosecution of a civil action with malice, and without probable cause, when there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action. ‘This doctrine is supported by the following consideration: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it.’ *Wetmore v. Mellinger et al.*, 64 Iowa, 744, 18 N. W. 870, 871, 52 Am. Rep. 465.”

In the argument on the motion for a directed verdict, both at the close of appellee's case and at the close of all the testimony in the case, and further in the argument on the motion to set aside the verdict, the appellee relied greatly upon the case of *National Surety Co. v. Page*, 58 Fed. (2nd) 145, and which was referred to in the Memorandum of the Justice in overruling the motion to set aside the verdict, and also the case of *Fulton v. Ingals*, 151 N. Y. Supp. 130. In the case of *National Surety Co. v. Page*, the Surety Com-

pany instituted statutory proceedings against Page, based under Section 4235 of the Virginia Code, and asked that a rule issue directing Page to show cause why his license as agent should not be revoked, and the rule was issued and dismissed.

Section 4235 of the Virginia Code is, in effect, a judicial proceeding for it permits an appeal to the Supreme Court of Appeals from such order as the Commissioners may make refusing or revoking the license as a matter of right, which is a greater privilege than is permitted to litigants in the Courts of the State of Virginia which only allows an appeal to the Supreme Court of Appeals on a writ of error.

After the dismissal of the rule, Page filed a suit against the National Surety Company and ended in a verdict for Page in the sum of Twenty-Five Thousand Dollars (\$25,000.00), from which judgment the Company appealed, and the Court said, at Page 148, the following:

“The first question which arises on the record is presented by the ruling on the demurrer to the declaration. This question, which is fundamental, is whether an action for malicious prosecution may be based upon a proceeding under the Virginia statute to revoke the license of an insurance agent; and we think that it must be answered in the affirmative. While actions for malicious prosecution are not favored by the law (18 R. C. L. 11, and cases cited), and while there is no precedent for the maintenance of an action in a case such as this, the principle upon which the action for malicious prosecution is grounded is clearly applicable. That principle requires that the law afford a remedy for the wrong sustained by one who has been injured in his person, reputation, property, or business by the institution of groundless proceedings in the courts. The groundless and malicious institution of criminal proceedings has always been held to furnish a basis for the action. It is generally held, however, that the institution of civil proceedings, not accompanied by arrest of the person, seizure of property, or other special injury, does not furnish such basis; the reasoning of this line of decisions being that resort to the courts should be open and free to all who have grievances and

seek remedies therefor, and that there should be no restraint upon the suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. Added to this is the consideration of public policy that it is in the interest of the state that there be an end of litigation, and that disputes be not tried a second time by the courts under the guise of actions for malicious prosecution. See *Peckham v. Union Finance Co. et al.*, 60 App. D. C. 104, 48 F. (2d) 1016, and cases cited. But the groundless and malicious institution of even civil suits will furnish a basis of action where accompanied by arrest of the person, seizure of property, injury to business, or other special damage. * * *

A proceeding under the Virginia statute to revoke the license of an insurance agent is not, strictly speaking, either a criminal or a civil action. It is an anomalous proceeding, penal in its nature, prosecuted, not for the benefit of an individual, but in the interest of the public. As said in *Commonwealth v. Sharp*, 155 Va. 714, 156 S. E. 570, 573: 'Its design is to protect the insured as well as the insurer. Its effect is to penalize the agent, not to constitute the Commission a clearing house or a collecting agency. * * * It was, in our opinion, the intention of the Legislature to compel a faithful discharge of that duty which an agent owes to his principal. Under the statute, the penalty for a violation of the confidence reposed is not fine or imprisonment, but a revocation or suspension of the certificate of registration.' "

When Section 4235 of the Virginia Code is analyzed and it shows that you do have such a statutory proceeding, it is, in its nature, a judicial proceeding for it does permit appeals from the action to the Courts of the Commonwealth.

In the Statute authorizing the licensing of private detectives, Title 20, Section 1741, it is as follows:

"(a) Private detectives, or detective agencies, by whatsoever name called, shall pay a license tax of \$100 per annum: Provided, That no license shall be issued under this section without the approval of the major and superintendent of police.

(b) For the purpose of this section, the term 'detective' or 'detective agency' shall mean and include any person, firm, or corporation engaged in the business of, or advertising, or representing himself, or itself, as being engaged in the business of detecting, discovering, or revealing crime or criminals, or securing information for evidence relating thereto, or discovering or revealing the identity, whereabouts, character, or actions of any person or persons, thing or things.

(c) It shall be unlawful for any person to engage in the business of detective, or operate, manage, or conduct a detective agency, for profit or gain, or to advertise or represent his business to be that of a detective, or that of conducting, managing, or operating a detective agency, without first obtaining a license so to do.

(d) The Commissioners of the District of Columbia are authorized and empowered to make such reasonable regulations as they deem advisable for the government and conduct of the business of private detectives licensed hereunder, and are further authorized and empowered to revoke the license of a private detective when in their judgment such is deemed advisable in the public interest.

(e) All laws which govern the Metropolitan police force of the District of Columbia in the matters of persons, property, or money shall be applicable to all private detectives licensed hereunder, and such detectives shall make like returns and dispositions of such matters as is required by existing law and the rules of the Commissioners of the District of Columbia governing the Metropolitan police department. (July 1, 1902, 32 Stat. 622, c. 1352, § 7; July 1, 1932, 47 Stat. 559, c. 366, par. 41.)

This Statute does not authorize any appeal to any Court from the action of the Commissioners, and they are authorized and empowered to revoke the license of a private detective when in their judgment such is deemed advisable in the public interest. It is purely a discretionary matter on the part of the Commissioners. Whereas, in the application for the license of employment agencies, Title 20, 1742

of the Code of the District of Columbia, being the following Section, it is stated: "Any license may be denied, revoked, or suspended for cause by the said Commissioners: Provided, That any person whose license shall be denied, revoked or suspended by the Commissioners may, within thirty days after such denial, revocation, or suspension, apply to any Justice of the Court of Appeals of the District of Columbia for a writ of error to review such action."

This shows a clear distinction between Section 4235 of the Virginia Code, referred to in the case of *National Surety Company v. Page*, and the one upon which appellee relies in this case, and further in the *National Surety Co. case*, the Surety Company caused the rule to be issued, whereas no affirmative act or acts were done by the appellants in this case, nor had they any knowledge that the appellee would be denied a renewal of his license by reason of the statements made to the police, and further in 1741 there is no appeal to the Courts and apparently none was intended, for in the following Section it permits appeals on writ of error on another type of case.

Actually there is no formal proceeding toward the obtaining of a detective's license. An application is filed for the renewal of the permit and it is denied by letter and the notification of the appeal is by a letter, and after the hearing the license issued.

In *Fulton v. Ingals*, 151 N. Y. Supp. 130, the complaint alleged that the defendants presented, or caused to be presented, to the Police Commissioner of the City of New York, against the plaintiff, who at the time was a member of the Police Department of that City, charges, which, if true, constituted a felony, and the matter was before the Court on Demurrer, and the Court said:

"In any event defendants must take one horn of the dilemma or the other. If the proceeding in which relator was tried was a judicial one, having been instituted maliciously and without probable cause, and plaintiff's personal and property rights have been interfered with pending the same, an action for malicious prosecution

will lie. If it was not a judicial proceeding, then an action for libel will lie."

It is respectfully submitted that no judicial action, either civil or criminal, was instigated, instituted or commenced by the appellants against the appellee, and that there had been no arrest of the person or seizure of the property of the appellee, and that there being no malicious prosecution proven against the appellants that their motion for directed verdict at the close of appellee's testimony, and at the close of all testimony in the case, and their motion to set aside the verdict and enter judgment in their favor should have been granted.

THE COURT ERRED IN ITS INSTRUCTION TO THE JURY COVERING THE REPUTATION OF APPELLEE.

No evidence of any kind was introduced covering the reputation of the appellee and apparently his reputation was not injured in any way, for his license as a private detective was issued to him under date of January 8, 1938, but the Court in its instruction to the jury (Appellants' Appendix 23) stated: "In determining the damages you will consider the harm, if any, done to plaintiff's reputation by any defamatory matter alleged as the basis of the proceeding and the expense which he has reasonably incurred in the proceedings, and any mental distress he has suffered in the proceedings."

This general instruction was objected to (Appellants' Appendix 19).

It is appellants' contention that, there being no evidence of any kind covering any injury which appellee sustained to his reputation, the instruction should not have been given over appellants' objection.

In the case of *W. B. Moses and Son v. Lockwood*, 54 Apps. D. C. 115, 295 Fed. 936, the Court says at Page 117:

"It is familiar law that an instruction must have some support in the evidence, else it should not be given."

In the case of *Swain v. American Surety Co. of New York*, a decision of the Court of Appeals of Georgia, under date of September 13, 1933, 171 S. E. 217, the Court stated:

“Where, in a suit against defendants who were county commissioners, instituted by a surety company who had paid the county the amount of the defalcation of the county treasurer upon whose bond the surety company was surety, to recover for the loss thus sustained by the plaintiff, upon the ground that the treasurer’s defalcation was the result of the defendants’ negligence in the discharge of their duties, in giving the treasurer the opportunity to misappropriate the county’s money, the expenses incurred by the defendants in making preparations to defend the suit, including traveling expenses, hotel bills, printing, and other expenses for this purpose, employing attorneys to defend the suit, and damages for embarrassment, mortification, humiliation, and being ‘held up to public scorn and ridicule,’ are expenses and damages resulting from the institution of all suits prosecuted to recover for like causes of action, and do not constitute any special damage or injury not necessarily resulting from the prosecution of the suit for like causes of action.”

It is respectfully submitted that, there being no evidence of injury to appellee’s reputation, the instruction should not have been given, and, having been given, it permitted the jury to speculate as to what injury he had sustained, and also for that reason the instruction would be bad, and that the Court should, under the circumstances, have granted a new trial.

THE COURT ERRED IN ITS INSTRUCTION TO THE JURY COVERING DAMAGES FOR MENTAL ANGUISH.

The only testimony given by the appellee covering mental anguish appears in Appellants’ Appendix 17, and it is as follows:

“That from the time he was denied a renewal of his license to the time it was again granted to him he did not sleep right, that he did not eat with any appetite,

and it was almost impossible for him to describe the anguish he went through at that time, which was continuous for two months, from the first of November, 1937, to January 5, 1938, and that the hearing on December 15, 1937, at the District Building, did not relieve his mind in the slightest because he did not know what the Board was going to do, and that the mental anguish and anxiety affected him physically; that he kept his office open to collect what money was coming in, but did not go to a doctor."

It is certain that the appellee suffered no more mental anguish than did the appellants, when he, without any right or authority, accosted them and endeavored to examine them and to enter the appellant Smith's apartment, with the authority that is sometimes assumed by private detectives and which was apparently assumed by the appellee in this case. They should be immune from any supposed illness growing out of any action which might be caused or brought about by their own actions.

There is no testimony on the part of the appellee that he actually sustained any physical illness, and the appellee relied, in the Trial Court, upon the case of *Clark v. Associated Retail Credit Men of Washington, D. C. Inc.*, 70 App. D. C. 183 105 Fed. (2nd) 62, but the most that can be said for that case is that it was before this Court on a Demurrer under which the defendant in that case, by reason of the Demurrer, admitted the allegations of the pleadings, under which it admitted that it intended to cause the plaintiff both mental and physical harm, and that it had succeeded in its purpose, but it is stated in that case, and I consider it as the law of the case, and the statement was taken from the case of *Maze v. Employees Loan Society*, 217 Alabama 44, 114 So. 574, as follows:

"We would expect * * * the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature

that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue. The advantage to society of preventing such harm seems greater than the advantage of leaving ill-disposed persons free to seek their happiness in inflicting it."

Surely, there is no evidence in this case that there was any intention, directly or otherwise, on the part of these appellants, to cause the appellee any mental or physical injury, and the most that can be gathered from the entire record is that the appellants had gone to the police and stated their version of what had occurred at the apartment house on the morning of August 17, 1937, and he certainly suffered no more mental or physical injury than would an ordinary person who has been made a defendant in a law suit, and it certainly cannot be said that a defendant in an ordinary law suit would be entitled to any damages for injuries caused him mentally or physically by reason of the filing of a suit.

CONCLUSION.

It is apparent from the record before this Court, based upon the Statement of Facts and the cases in support of appellants' contention, that the Trial Court erred in refusing to hold that the appellee had failed to make out a case of malicious prosecution and that it should have granted appellants' motions for a directed verdict and also should have granted appellants' motion to set aside the verdict or judgment and to enter judgment for the appellants.

It further appears that the Court erred in its instruction to the jury covering reputation and injury to the appellee,

for there is no evidence to support any such instruction, and it left it to the jury to speculate on the damages sustained by the appellee, for in no other way could they have reached a finding that he had sustained damages in that sum, for it certainly is not borne out by the evidence.

It is respectfully submitted that the case should be reversed, with direction to the Trial Court to enter judgment for the appellants.

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APPENDIX

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APPENDIX TO BRIEF FOR APPELLANT

1

Declaration

1: The plaintiff, Frederick G. Pence, of the District of Columbia, sues the defendants, Bruce Lee Melvin and Elna N. Smith, also of said District, for that heretofore, to-wit, October 13, 1937, and for a long time prior thereto, the plaintiff was, and he still is, a private detective duly licensed to practise in the District of Columbia, and then practising, and he still practises, under the style of Washington Detective Agency and in such capacity enjoyed an excellent reputation for ability and credibility, and for that heretofore, to-wit, October 13, 1937, the defendants con-

spired together, acted in concert, and without reasonable or probable cause, but wrongfully and unjustly contriving and intending to harass, oppress, and injure plaintiff, and cause him to lose his license as detective aforesaid, and thereafter to be prosecuted, falsely and maliciously represented to the authorities of the District of Columbia that on or about August 18, 1937, plaintiff had represented himself to them to be a member of the Metropolitan Police of the District of Columbia, attached to the Detective Bureau, whereupon plaintiff was cited before the officials of the District of Columbia in that behalf authorized, for a hearing in order to determine whether his license should be revoked,

and a new license refused him; that plaintiff there-
 2 upon was required to defend himself, to employ counsel, to testify, and to produce witnesses to testify; that after hearing the testimony of the defendants and of the other witnesses, the District authorities aforesaid determined that the charges against the plaintiff were false and groundless, and therefore said charges were dismissed; that by means of the defendants' wrongful, unjust, groundless, false, oppressive, malicious conduct aforesaid, plaintiff suffered great mental anguish, and was injured in his credit and circumstances, and in his previous good standing with the Metropolitan Police, was hindered in the transaction of his lawful business aforesaid, and was suspended from practice pending the investigation of said charge, to-wit, for the period of two months, and was forced to lay out and expend, and did necessarily lay out and expend divers large sums of money, to-wit, the sum of \$250, in and about defending himself from the charges so wrongfully, unjustly, false, oppressively, and maliciously made against him by the defendants as aforesaid, and has been and is by means of the premises otherwise greatly injured and damaged, to-wit, in the sum of \$10,000.

2. Or in the alternative, the plaintiff, Frederick G. Pence, of the District of Columbia, sues the defendant, Bruce Lee Melvin, also of said District, for that heretofore, to-wit, October 13, 1937, and for a long time prior thereto, the plaintiff

was, and he still is, a private detective duly licensed to practice in the District of Columbia, and then practising and he still practises, under the style of Washington Detective Agency, and in such capacity enjoyed an excellent reputation for ability and credibility, and for that heretofore, to-wit, October 13, 1937, said defendant, without reasonable or probable cause, but wrongfully and unjustly contriving and intending to harass, oppress, and injure plaintiff, and cause him to lose his license as detective aforesaid, and thereafter to be prosecuted, falsely and maliciously represented to the

authorities of the District of Columbia that on or
 3 about August 18, 1937, plaintiff had represented himself to said defendant to be a member of the Metropolitan Police of the District of Columbia, attached to the Detective Bureau, whereupon plaintiff was cited before the officials of the District of Columbia in that behalf authorized, for a hearing in order to determine whether his license should be revoked, and a new license refused him; that plaintiff thereupon was required to defend himself, to employ counsel, to testify, and to produce witnesses to testify; that after hearing the testimony of said defendant and of the other witnesses, the District authorities aforesaid determined that the charges against plaintiff were false and groundless, and therefore said charges were dismissed; that by means of said defendants wrongful, unjust, groundless, false, oppressive, malicious conduct aforesaid, plaintiff suffered great mental anguish, and was injured in his credit and circumstances and in his previous good standing with the Metropolitan Police, was hindered in the transaction of his lawful business aforesaid, and was suspended from practice pending the investigation of said charge, to-wit, for the period of two months, and was forced to lay out and expend, and did necessarily lay out and expend divers large sums of money, to-wit, the sum of \$250, in and about defending himself from the charges so wrongfully, unjustly, false, oppressively, and maliciously made against him by said defendant as aforesaid, and has been and is by means of the premises otherwise greatly injured and damaged, to-wit, in the sum of \$10,000.

3. Or in the alternative, the plaintiff, Frederick G. Pence, of the District of Columbia, sues the defendant, Elna N. Smith, also of said District, for that heretofore, to-wit, October 13, 1937, and for a long time prior thereto, the plaintiff was, and he still is, a private detective duly licensed to practice in the District of Columbia, and then practising, and he still practices, under the style of Washington Detective Agency, and in such capacity enjoyed an excellent reputation for ability and credibility, and for that heretofore, to-wit, October 13, 1937, said defendant, without

4 reasonable or probable cause, but wrongfully and unjustly contriving and intending to harass, oppress, and injure plaintiff, and cause him to lose his license as detective aforesaid, and thereafter to be prosecuted, falsely and maliciously represented to the authorities of the District of Columbia that on or about August 18, 1937, plaintiff had represented himself to said defendant to be a member of the Metropolitan Police of the District of Columbia, attached to the Detective Bureau, whereupon plaintiff was cited before the officials of the District of Columbia in that behalf authorized, for a hearing in order to determine whether his license should be revoked, and a new license refused him; that plaintiff thereupon was required to defend himself, to employ counsel, to testify, and to produce witnesses to testify; that after hearing the testimony of said defendant and of the other witnesses, the District authorities aforesaid determined that the charges against plaintiff were false and groundless, and therefore said charges were dismissed; that by means of said defendant's wrongful, unjust, groundless, false, oppressive, malicious conduct aforesaid, plaintiff suffered great mental anguish, and was injured in his credit and circumstances, and in his previous good standing with the Metropolitan Police, was hindered in the transaction of his lawful business aforesaid, and was suspended from practice pending the investigation of said charge, to-wit, for the period of two months, and was forced to lay out and expend, and did necessarily law out and expend divers large sum of money, to-wit, the sum of \$250, in

and about defending himself from the charges so wrongfully, unjustly, false, oppressively, and maliciously made against him by said defendant, as aforesaid, and has been and is by means of the premises otherwise greatly injured and damaged, to-wit, in the sum of \$10,000.

Wherefore plaintiff brings his suit, and claims of defendants, or in the alternative the defendant Bruce Lee
 5 Melvin, or in the alternative the defendant Elna N. Smith, damages in the amount of \$10,000, besides costs.

FREDERICK G. PENCE,
Plaintiff.

JOHN P. LABOFISH,
Attorney for Plaintiff,
 1206 Peoples Life Ins. Bldg.,
 1343 H Street, N. W.,
 Washington, D. C.

* * * * *
 6 *Amended Answer to Declaration*

1. Come now the defendants, Bruce Lee Melvin and Elna N. Smith, and each of them, by and through their attorney, Cornelius H. Doherty, and, for answer to the Declaration and each and every count thereof, they, and each of them, deny each and every material allegation in the said Declaration and each and every count thereof contained.

2. For further answer to the said Declaration and each and every count thereof, these defendants say that the plaintiff did represent himself to these defendants as from the Washington Detective Bureau, and this matter was reported to the police for investigation and for the protection of these defendants.

3. For further answer to the said Declaration and each and every count thereof, these defendants, and each of them, say that the statements made to the police were made in good faith and believing them to be true and are privileged.

4. These defendants and each of them deny that the plain-

tiff was in any way injured or damaged by reason of any act or statements of these defendants.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Defendants.

Copy of the foregoing Amended Answer acknowledged this 10th day of February, 1941.

JOHN P. LABOFISH
Attorney for Plaintiff.

Leave to file granted.

.....
Justice.

7 In the District Court of the United States
For the District of Columbia
Civil No. 90484

FREDERICK G. PENCE, trading as Washington Detective
Agency, *Plaintiff.*

vs.

BRUCE LEE MELVIN, ELNA N. SMITH, *Defendants.*

Verdict and Judgment

This cause having come on for hearing on the 17th day of March, 1941, before the Court and a jury of good and lawful persons of this district, to wit:

Eva T. Clark
Carson L. Easterling
Marvin B. Holleman
Paul Snouffer
William A. Turner
Lawrence B. Battley
Zellah B. Adams
Herbert B. Lowrey
Chester A. Carter
J. William Falk
Bertha S. Chase
J. Stanley Lacey

who, after having been duly sworn to well and truly try the issues between Frederick G. Pence, trading as Washington Detective Agency, plaintiff and Bruce Lee Melvin and Elna N. Smith, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 21st day of March, 1941, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Twelve Hundred Fifty Dollars.

Wherefore, it is adjudged that said plaintiff recover of the said defendants the sum of Twelve Hundred Fifty Dollars together with costs.

CHARLES E. STEWART,
Clerk,

By GEORGE A. WATTS,
Assistant Clerk.

By direction of
JUSTICE PINE.

* * * * *

8 *Motion to Set Aside Verdict*

Come now the defendants, Bruce Lee Melvin and Elna N. Smith, and each of them, by and through their attorney, Cornelius H. Doherty, and move the Court to set aside the judgment entered herein and to enter judgment for the defendants, Bruce Lee Melvin and Elna N. Smith, or grant a new trial, and, for reasons therefor, say:

1. That the verdict and judgment is contrary to law.
2. That the verdict and judgment is without evidence to support it.
3. That the Court erred in denying the motion to direct a verdict in favor of the defendants at the close of the plaintiff's case.
4. That the Court erred in denying defendants' motion to direct a verdict at the close of all the evidence in the case.
5. That the Court erred in its rulings on the admission and exclusion of evidence.

6. That the Court erred in its instruction to the jury.
7. And for other reasons apparent of record.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Defendants.

* * * * *

9 *Memorandum Opinion*

Defendants move the court to set aside the judgment for plaintiff entered herein and to enter judgment for defendants or grant a new trial.

The Motion to Set Aside the Judgment

This motion is apparently based on the motion for a directed verdict made by defendants at the close of all the evidence (Rule 50b, F.R.C.P.).

This is an action for damages on account of alleged malicious prosecution of proceedings before the Police and District of Columbia authorities. The point principally relied upon by defendants is that such an action cannot be based upon proceedings which were not in a court of law. I am of the opinion that a suit for malicious prosecution may be maintained where the proceedings complained of were not in a court of law, but were before an administrative agency, as in this case. *National Surety Company v. Page*, 58 F. (2d) 145, 148; *Restatement of the Law of Torts*, Vol. III, sec. 680. The cases cited by defendants in the District Court of Appeals, namely, *Auerbach v. Freeman*, 43 App. D. C. 176, and *Peckham v. Union Finance Co. et al*, 60 App. D. C. 104, are not in conflict. In *Auerbach v. Freeman*, supra, the court held that a suit for malicious prosecution could not be maintained when there was no prosecution, and indicated that the proper remedy in that case was an action for false imprisonment. *Peckham v. Union Finance Company*, supra, involved a civil suit brought by the Union Finance Company against Peckham and others where the court

simply held that "no action will lie for recovery of damages sustained by the prosecution of a civil action with malice and without probable cause when there has been no arrest of person or seizure of property of defendant and no special injuries sustained which would not necessarily result in all suits prosecuted to recover for like causes of action." The acts of defendants in this case were not equivalent to a suit brought against plaintiff by defendants in a civil action. Instead, they involved the making of statements to the police which might have resulted in a criminal prosecution,¹ but which in fact were the bases for proceedings which resulted in the refusal on the part of the District authorities to renew the license of plaintiff as a private detective. After this refusal and at the instance of plaintiff, and after a hearing, the license was issued.

Defendants also claim that there was not sufficient evidence that defendants initiated the proceedings. There was evidence that both defendants appeared before the Police Department after application of plaintiff for renewal of his license had been received by the Police Department. Defendant Smith, on that occasion, swore to a statement previously made, and defendant Melvin made and swore to a statement. These statements were made the basis for the recommendation for the denial of the renewal of the license of plaintiff as a private detective. This, in conjunction with acts of defendants preceding this occasion, is sufficient to justify submission to the jury of the question whether or not they initiated the proceedings.

11 There was evidence that the defendants made the statements to the police without probable cause and with malice and that these statements were the bases for the proceedings which resulted in the denial of the application for renewal of plaintiff's license as a private detective. Assuming that defendants' purpose was originally to report the misconduct of a man thought by defendants to be a member of the Metropolitan Police Department, there was evi-

¹ T. 6, sec. 303, 1929 Code D. C.

dence that after learning that plaintiff was not an officer of the Police Department, both defendants came to the Police Department and charged plaintiff with misrepresenting himself to them. There was nothing actionable in that if they had probable cause for so doing. The lack of probable cause was an issue of fact as to which the testimony was in conflict.

The Motion for a New Trial

Defendants complain that mental distress and injury to reputation were submitted to the jury as an element of damages. In my judgment this was proper. Restatement of the Law of Torts, Vol. III, sec. 681; Black v. Canadian Pacific R. Co., 218 Fed. 239; Bergeron v. Goldman, 64 F. (2d) 917. Cf. Clark v. Associated Retail Credit Men of Washington, 70 App. D. C. 183.

Both motions are accordingly denied.

DAVID A. PINE

Justice.

April 24, 1941.

* * * * *

14 *Points Upon Which Defendants Intend to Rely*

1. The Court erred in holding that plaintiff made out a case of malicious prosecution.
2. The Court erred in its instruction to the jury covering the reputation of plaintiff.
3. The Court erred in its instruction to the jury covering damages for mental anguish.

CORNELIUS H. DOHERTY

1010 Vermont Avenue, N. W.

Washington, D. C.

Attorney for Defendants.

Copy of the foregoing Points acknowledged this 29th day of May, 1941.

JAMES R. MURPHY

Attorney for Plaintiff.

* * * * *

Statement of Evidence

Be it remembered that at the trial of this case before Mr. Justice David A. Pine, which trial began on the 16th day of March, 1941, and thereafter was further proceeded with, it is agreed that the substance of the testimony hereinafter set forth is the substance of all the evidence introduced at the trial of the case covering the points upon which defendants rely on appeal:

Frederick G. Pense, being first duly sworn, testified in his own behalf, on direct examination, in substance, as follows:

That he has been a licensed private detective since 1933, and that he handles domestic relations cases and at one time operated in a capacity of detective for nearly all of the large office buildings in town, and that his work at times brought him in contact with the Police Department; that in the early part of August, 1937, he was employed by Mrs. Blanche Melvin to shadow the movements of Mr. Melvin, one of the defendants herein, and that on the morning of August 18, 1937, he accosted the defendants as they came out of an apartment on the third floor of 327 2nd Street, N. E., and was asked by the defendant Elna N. Smith to state who he was, and that he showed her his badge; that they were standing very close together at the time and he pulled his coat lapel back and she read the badge; that he did not state who he was nor state that he was from the Washington Detective Bureau or from the Washington Detective Agency; that he did not tell her anything, and that she later again asked to see his badge, and the badge with the name of F. G. Pence on the top line, with the eagle in the circular part of the badge surrounded by the words "Washington Detective Agency" was presented to the jury.

That on October 26, 1937, he received a letter from the Commissioners' Secretary that his license as a private detective would not be renewed, and this refusal was based upon the recommendation of the Major and Superintendent of Police, and thereafter he employed an attorney and ar-

ranged to have a hearing of his case before a Board appointed by the Commissioners, which was held on the 15th day of December, 1937; that his license expired on the 1st day of November, 1937, and he received permission to operate near the latter part of November, 1937, for the time pending a final disposition of his appeal; that the refusal of the Major and Superintendent of Police was based upon two affidavits filed with the Major and Superintendent of Police, stating that on August 18, 1937, plaintiff had interviewed them on a domestic matter and that he had stated that he was from the Washington Detective Bureau, which affidavits were introduced in evidence; that his appeal to the Commissioners was granted and a license issued to him on January 5, 1938; that from the time he was denied a renewal of his license to the time it was again granted to him he did not sleep right, that he did not eat with any appetite and that it was almost impossible for him to describe the anguish he went through at that time, which was continuous for two months, from the first of November, 1937, to January 5, 1938, and that the hearing on December 15, 1937, at the District Building, did not relieve his mind in the slightest because he did not know what the Board was going to do, and that the mental anguish and anxiety affected him physically; that he kept his office open to collect what money was coming in, but did not go to a doctor.

On cross-examination, he denied that he had ever informed the defendants that he was from the Washington Detective Bureau, and that the defendant Elna N. Smith read what was on the badge on both occasions; that during this period from November 1, 1937, to January 5, 1938, he never closed his office at any time.

It was stipulated that if Mrs. Pence were present that her testimony on the point of mental anguish would be substantially the same as that given by Mr. Pence.

The plaintiff also called Mrs. Blanche M. Melvin, Mrs. Mildred D. Neely, Police Inspector Bernard W. Thompson, Donald K. Martin and Edward J. Bailey, and their testimony is not set forth herein because it has no bearing on the points upon which the defendants rely on appeal.

At the close of the plaintiff's case the plaintiff, in open Court, stated that they would base their cause of action entirely on malicious prosecution committed by the defendants jointly, and defendants moved for a directed verdict on the ground that the plaintiff had failed to introduce sufficient evidence to constitute, in law, an action for malicious prosecution, in that the plaintiff had failed to show that a judicial action had been instituted by the defendants against the plaintiff, or that they had instituted a malicious civil or criminal prosecution against the plaintiff, which said motion was overruled, with leave to renew the same at the close of all the testimony in the case. Thereafter the defendants were called as witnesses in their own behalf, and in addition called Mrs. Bessie Lehmann and Mrs. Grace Olin Jordan, and their testimony is not set forth, for it is not considered necessary for the points upon which the defendants rely for their appeal.

The defendants then renewed their motion for a directed or instructed verdict on their behalf, on the ground previously set forth in the motion for directed verdict at the close of the plaintiff's testimony, and which said motion was denied.

The Court then instructed the jury in the following words, the defendants objecting to the general charge,
 19 insofar as it covered damages for mental anguish and to the plaintiff's reputation, on the ground that there was no evidence to support these elements of damages:

"Members of the jury: You are engaged in the trial of an action brought by Frederick G. Pence, plaintiff, against Bruce Lee Melvin and Elna N. Smith, defendants.

Plaintiff claims money damages against the defendants to compensate him for injuries which he contends were suffered by him on account of the alleged initiation of proceedings by defendants in the Police Department which resulted in the temporary denial by the District authorities of his application for a renewal of his license to engage in the business of a private detective. This was followed by a hearing and the issuance of the license.

At the outset, you are instructed that information given to the police, or statements indicating that suspicion has been directed to a certain person, when made in good faith, are ordinarily privileged, and it is the duty of any person having any information in relation to the commission of a crime to bring this information to the notice of the police and when persons do so under such circumstances they are not subject to liability for their conduct.

As you will recall, the defendants have testified that the plaintiff represented himself to be a member of the Washington Detective Bureau, whereas, in truth and in fact, he was a private detective and not a member of the Washington Detective Bureau.

Plaintiff, on the other hand, has testified that he did not represent himself to be a police officer, but merely displayed his badge which was read by the defendant Smith and on which appeared the words: "Frederick G. Pence, Washington Detective Agency, D. C."

20 Plaintiff also produced certain witnesses in corroboration of his testimony, although one of them said plaintiff stated on the occasion in question that he was a private detective.

If you find by a fair preponderance of the evidence that defendants, acting in concert or independently of each other, maliciously initiated the proceedings in the Police Department, and that such proceedings were initiated without probable cause on the part of the defendants to believe that the charge against plaintiff on which the proceedings were based was well founded, and that the proceedings had been terminated in favor of the plaintiff, then your verdict will be for the plaintiff. If you do not so find then your verdict will be for the defendants.

Also, if you find that one of the defendants acting alone maliciously initiated the proceedings in the Police Department and that such proceedings were initiated without probable cause on the part of that defendant to believe that the charge against plaintiff on which the proceedings were based was well founded, and that the proceedings had been ter-

minated in favor of the plaintiff, then your verdict will be against that defendant, and if you do not so find, of course, your verdict will be for the defendants.

Summarized, you must find by a fair preponderance of the evidence four elements before you may find for the plaintiff against one or both defendants, namely, the initiation of the proceedings, malice, want of probable cause, and favorable termination of proceedings.

The favorable termination of the proceedings is undisputed. This leaves to your determination the three remaining elements. I shall, in a moment, define the terms I have used to you according to their legal meaning, namely,
 21 initiation, want of probable cause, and malice.

The burden of proof is upon the plaintiff to establish all of these elements by a fair preponderance of the evidence. If the plaintiff carries this burden your verdict will be for the plaintiff against both defendants or one defendant depending on whether the plaintiff has sustained this burden as to both defendants or only one defendant. If plaintiff does not sustain this burden or the evidence is evenly balanced, your verdict will be for the defendant or defendants as you may find.

As I have stated to you, I shall now define these expressions that I have used:

I have used the word 'initiate'. This means the setting of the machinery of the law in motion.

I have also used the expression 'probable cause', and I now instruct you on the meaning of that expression: One who initiates proceedings against another has probable cause for so doing if he reasonably believes in the existence of the facts upon which his action is based.

In this case if you believe that at the time of the initiation of the proceedings, if you find they were initiated by the defendants or either of them, there were such facts and circumstances as would reasonably excite the belief in the mind of an ordinary cautious person, acting on the facts and circumstances within the knowledge of the instigator of the proceedings, that the accused was guilty of the conduct

charged, this would constitute probable cause, and if there be probable cause the motives which have actuated the instigator of the proceedings are not material. In other words, if you believe from the testimony that plaintiff stated he was a member of the Washington Detective Bureau and otherwise conducted himself in a manner to give an ordinary cautious person the belief that he was a member of the Metropolitan Police Department, when in truth he was not, that would constitute probable cause. If, on the other hand, you believe plaintiff did not make such statement but simply displayed his badge so it could be read, or stated he was a private detective, then there would not be probable cause for the initiation of the proceedings.

I have used the words 'maliciously' and 'malice'.

Malice is an element in this suit and it cannot be maintained unless it be shown affirmatively that the defendant or defendants whom you may find to have initiated the proceedings, if you find they were initiated by either or both defendants, was or were actuated by malice or some improper or sinister motive, that is, that they were initiated primarily for a purpose other than that of securing appropriate action by the Police Department and District authorities, in other words that they acted in bad faith.

A malicious act is a wrongful act intentionally done without just cause or excuse. A malignant spirit, a spirit of ill will, or specific intention to hurt a particular person is not, necessarily, an essential element.

Malice, either expressed or implied, and the want of probable cause, must concur before you may find for the plaintiffs. They must be found by the jury or the action cannot be sustained.

Malice may be inferred by you from the want of probable cause if not inconsistent with other facts in the case. Lack of probable cause, however, cannot be inferred from the presence of malice.

There has been certain testimony in this case as to statements which certain of the witnesses made out of court before they testified here in this court. What

they stated out of court is not evidence of the truth of their statements at all but the evidence in this case is what is testified before you under oath, but you are the judges of the facts, judges of the credibility of the witnesses, and when you consider—and you may consider—any contradictory statements which have been made heretofore as bearing upon the credibility of witnesses, that is, bearing upon the faith and credit you may give to their testimony; if you find any witness has knowingly testified falsely about any material facts about which he could not be reasonably mistaken you may disregard that witness' testimony in whole or in part as you see fit.

If under these instructions you find for the plaintiff, then and only then will you come to the question of damages.

In determining the damages you will consider the harm, if any, done to plaintiff's reputation by any defamatory matter alleged as the basis of the proceeding and the expense which he has reasonably incurred in the proceedings, and any mental distress he has suffered in the proceedings.

I used the term 'preponderance of the evidence' and 'fair preponderance of the evidence.' By that is meant that the evidence must convince and satisfy you members of the jury. It does not depend on the greater number of witnesses on the one side or another. In order to determine on which side the preponderance of the evidence is the law permits you to take into consideration the opportunity of the several witnesses of seeing and knowing the things about which they testified, their conduct and demeanor while testifying, their interest, if any, in the outcome of the suit, their bias or prejudice, if any, either for or against either of the parties to the suit and the probability or improbability
24 of the truth of their several statements.

With these matters taken into consideration, with all the facts and circumstances in evidence, you may determine where the preponderance of the evidence lies.

You must bear in mind it is your exclusive duty, as jurors, to determine the facts. The Court deals with questions of law both in his rulings on the admission of evidence and in the giving of these instructions.

It is your duty to follow the law as I have given it to you but, with your finding as to the facts established by the evidence the Court has nothing to do. It has no right in any manner or in any way to influence you. If in my rulings on objections or questions I see fit to propound to witnesses, or in these instructions, you gain the impression that I incline to a particular view as to the merits of the controversy you must shut that impression from your minds and under no circumstances must you be influenced by it.

You will not permit sympathy or prejudice for or against either of the parties to this litigation to influence you in any manner, but you will decide this case calmly and dispassionately and solely on all the evidence admitted or according to the inferences which you may reasonably draw from the evidence.

Your verdict will be one of the following:

For the plaintiff against both defendants in a definite amount of money; or

For plaintiff against one of the defendants for a certain amount of money and for the remaining defendant in such event; or

For the defendants."

25 And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendants may have their case reviewed on appeal, the parties, by their attorneys of record, hereby approve the foregoing Statement of Evidence.

Approved:

JAMES R. MURPHY

Attorney for Plaintiff.

CORNELIUS H. DOHERTY

Attorney for Defendants.

1010 Vermont Ave N W

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

—
No. 7968
—

BRUCE LEE MELVIN & ELNA N. SMITH, *Appellants*

v.

FREDERICK G. PENCE, t/a, Washington Detective
Agency, *Appellee*

—
JAMES R. MURPHY,
American Security Building
JOHN P. LABOFISH,
Peoples Life Insurance Building
Attorneys for Appellee

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7968

BRUCE LEE MELVIN & ELNA N. SMITH, *Appellants*

v.

FREDERICK G. PENCE, t/a, Washington Detective
Agency, *Appellee*

BRIEF FOR APPELLEE

STATEMENT OF THE CASE.

A statement of the case is contained in the appendix to Appellants' Brief, wherein the Declaration, the Amended Answer, the Memorandum Opinion of the Court denying the Motion to Set Aside, and condensed statement of evidence is contained. The Statement of the Case contained in Appellants' Brief, pages two to four, is too narrowly condensed to convey a clear understanding, and counsel respectfully refers the Court to the more complete statement in the appendix. It is also pointed out that there is no conflict as to the facts or as to the testimony of the witnesses. Briefly, the testimony was that the appellee, a duly and regularly licensed private detective, was denied and refused a renewal of his license by reason of certain affidavits filed by the appellants with the Metropolitan Police Department; that the appellee appealed the denial of his license to the Board of Commissioners of the District of Columbia; that a hearing was held before the District

License Denial and Revocation Board, testimony taken, including testimony of the appellants; and that several months after date on which he was refused a license, the Board of Commissioners, after a hearing upon his appeal, ordered a license issued to him; that it was necessary in appellee's business to have a good reputation, because it was essential that he have the good will of the Police Department and public authorities, and because it frequently was necessary for him to testify in court actions; that he was caused to be without a license to operate his business for a time, that he incurred expenses in connection with his appeal and hearing, that in addition he suffered mental anguish, that the charges made and affidavits filed by the appellants against the appellee were false and were actuated by malice and with the intent to injure the appellee's reputation and to destroy his business and right to carry on his occupation; and with the object of destroying the effect of possible testimony of Pence in domestic litigation between Pence's client, the wife of Appellant Melvin, and said appellant; that is, to discredit Pence by showing official action denying Pence a license as a private detective.

The appellants answered by general denial, and by the affirmative plea that the charges made by them were true, and therefore assumed the burden of proving their truth. This they failed to do. The jury, by its verdict, decided all issues of fact in favor of the appellee.

Among the exhibits introduced in evidence were:

(1) Affidavit of Elna N. Smith, dated September 14, 1937, sworn to on October 13, 1937, filed with the Metropolitan Police Department. The first paragraph of that affidavit makes a violent, vituperative attack upon Mrs. Blanche Melvin, wife of Appellant Bruce L. Melvin. In this paragraph, and throughout is indicated the malicious disposition of the affiant. In the fourth paragraph, on page two of her affidavit, the said appellant made the following statement:

"On September 3rd, therefore, I returned to Washington and came to talk to Metropolitan Police Headquarters about the incident and to ask what could be done to stop her performances *and to prosecute the*

man who had represented himself as an officer with authority." (Italics supplied)

(2) An affidavit of appellant Melvin, dated October 13, 1937. This affidavit also charges that the appellee impersonated an officer.

(3) Copy of a letter dated September 16, 1937, written by appellant Melvin to his then attorney, Mr. Smith. That letter indicates the elaborate plans laid by the appellants to trap the appellee, clearly exposes their malice toward him, and explains somewhat the thoroughness with which the appellants laid their plans to prosecute Pence and to cause him trouble. This letter also shows the conspiring and conniving together of the appellants.

(4) Plaintiff's exhibit "H", a memorandum from Lt. Horace W. Lineburg, of the Police Department to Bernard W. Thompson, Assistant Superintendent of Police, in which attention is called to the affidavits submitted by Mrs. Elna N. Smith and Bruce L. Melvin, "also copy of letter written by Mr. Melvin to his attorney."

QUESTION PRESENTED.

The only real point involved in this appeal is whether an action in the nature of an action for malicious prosecution will lie under such circumstances as are involved in this suit, that is, whether Pence, who claimed injury to his reputation, to his business, monetary loss and mental suffering, by reason of official action of public authorities based upon and instigated by false and malicious charges and affidavits made against him before a public authority such as the Metropolitan Police Department jointly by appellants Melvin and Smith, and who was compelled to appeal such official action before an administrative Board, the Board of Commissioners of the District of Columbia, resulting in a finding and decision in his favor, may maintain this action against the persons responsible, in this case the appellants Melvin and Smith. The Board acting for the

Commissioners in this instance was the Board of License Denials and Revocations, created by their order in 1932. This Board is similar to the Board created by order of the District Commissioners to hear and determine appeals by persons whose licenses to drive automobiles have been suspended or revoked. All such administrative boards are quasi-judicial in their characteristics and functions.

ARGUMENT.

(a) Form of the Action.

Under the new rules of civil procedure and practice, there is no longer any magic in words which were formerly used to designate particular actions. Under liberal rules of pleading and practice now in effect, a plaintiff is required only to state a cause of action, and if he does state facts which, if proved, entitle him to redress, then it matters little by what name his action is called. Liberal practice requires that he be permitted to recover for any injury done to him, as in this case. The Declaration here merely stated the facts, and the trial judge submitted the case to the jury on the facts as developed by all the evidence, under appropriate instructions on the law applicable thereto.

Rule 8 (a) of the Federal Rules of Practice provides:

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, or counter-claim, cross-claim, or third party claim shall contain:

(1) A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.

(2) A short and plain statement of the claim showing that the pleader is entitled to relief, and

(3) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

In commenting upon sub-section (a) (2) of the above rule, Moore's Federal Practice, beginning at page 547, states:

"Common law pleading had been devoted to the development of an issue. Code pleading places less emphasis upon issues and more on stating the facts. The reason for this was, in the main, the endeavor to avoid the necessity, which arose under the common law form of action of the litigant deciding at his peril on the correct legal theory applicable to his case. Under Code pleadings the objective was that the plaintiff should state what happened and the Court should apply the law to it. The draftsmen of the codes apparently believed that the pleader's statement could be made in terms of facts; that it was easy to distinguish 'facts', 'ultimate facts', 'evidence' and 'conclusions of law'. Courts have likewise shared that belief and have been lead into fine distinctions in defining those terms. It has now come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon, and that considerable flexibility should be accorded the pleader."

Rule 8 (f), *Construction of Pleadings*: "All pleadings should be so construed as to do substantial justice." Moore's comment on this rule states:

"This mandate is the heart of the rules on pleading. In carrying out this mandate, recent language of the Supreme Court is most important:

"'Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end.'" [Citing *Maty v. Graselli*, 58 S. Ct. 507, 509.]

On page 440, Vol. I, Moore's Federal Practice, modern objective in pleading is stated as follows:

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved."

Restatement of Torts, Vol. III, Ch. 30, Sec. 674.

“One who initiates or procures the initiation of civil proceedings against another is liable to him for harm done thereby, if:

- (a) The proceedings are initiated:
 - (1) Without probable cause, and
 - (2) Primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and,
- (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

In the Restatement of Torts there is classified as Division Seven “Unjustifiable Litigation,” which includes Wrongful Prosecution of Criminal Proceedings, and Wrongful Initiation of Civil Proceedings, and under the latter heading is listed “Proceedings Before an Administrative Board.” Elements of damage recoverable are substantially the same in each instance.

Restatement of Torts, Ch. 30, Sec. 680—“Proceedings Before an Administrative Board”:

“One who initiates or procures the initiation of civil proceedings against another before an administrative board which has power to take action adversely affecting the legally protected interests of the other is subject to liability for any special harm caused thereby if,

- (a) the proceedings are initiated,
 - (1) without probable cause to believe that the charge or claim on which the proceedings are based is well-founded, and
 - (2) primarily for a purpose other than that of securing appropriate action by the board, and
 - (3) the proceedings have terminated in favor of the person against whom they are brought.”

The comment on this rule states that it is immaterial that the action of the board is subject to review by a court, except that if an appeal is taken the proceedings are not considered terminated until the appeal is determined.

Section 681 of the same chapter states that the plaintiff is entitled to recover for the harm to his reputation by any defamatory character of the matter alleged as the basis of the proceedings, the expense which he has reasonably incurred in defending himself, any specific pecuniary loss, and for any distress which is caused by the proceedings.

Restatement of Torts, Vol. IV, Ch. 43, Sec. 873, contains the following statement:

“A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other, is liable to the other for such resulting harm as he should have realized might have been caused by his statement.”

Section 870 of the same chapter states as follows:

“A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm as results, except where the harm results from an outside force the risk of which is not increased by the defendant's act.”

National Surety Co. v. Page, 58 F(2) 145. This was an action for malicious prosecution. Page was a licensed insurance agent, representing the National Surety Company. The Insurance Company filed with the Insurance Commissioner of the State of Virginia an affidavit charging that Page had collected premiums which he had failed to apply. At the request of the Insurance Company, the Insurance Commissioner of the State filed the affidavit with the Corporation Commission and asked that a rule issue directing Page to show cause why his license should not be revoked. A hearing was had and the rule was dismissed. Page then sued the Surety Company for damages. The United States Circuit Court of Appeals for the Fourth Circuit held in this

case that an action for malicious prosecution may be based upon a proceeding under the Virginia statute to revoke the license of an insurance agent. The Court states (148):

“While actions for malicious prosecution are not favored by the law and while there is no precedent for the maintenance of an action in a case such as this, the principle upon which the action for malicious prosecution is grounded is clearly applicable. That principle requires that the law afford a remedy for the wrong sustained by one who has been injured in his person, reputation, property, or business by the institution of groundless proceedings in the courts. The groundless and malicious institution of a criminal proceeding has always been held to furnish a basis for the action. It is generally held, however, that the institution of civil proceedings not accompanied by arrest of the person, seizure of property, or other special injury, does not furnish such basis * * * but the groundless and malicious institution of even civil suits will furnish a basis of action where accompanied by arrest of the person, seizure of property, injury to business, or other special damage.”

Further, on page 148, the Court stated:

“The institution of such a proceeding against an insurance agent is calculated to injure his reputation and standing in the community and to affect his business injuriously. Like a criminal action it should be instituted not for the benefit of an individual, but the protection of the public. If it be instituted maliciously and without probable cause, I see no reason why the party injured thereby should not have redress in an action in damages just as he would in the case of a groundless criminal prosecution.”

The prosecution in that case was not judicial, was not a criminal prosecution and not a civil action as we are accustomed to describe civil suits.

Fulton v. Ingalls, 151 N. Y. Sup. 130. In this case the declaration alleged that the defendants presented to the Police Commissioner of New York, against the plaintiff, a

member of the police department, charges which, if true, constituted a felony; that the charges were false, were presented maliciously and without probable cause; that the plaintiff was acquitted after a hearing, and that he suffered damages. The defendants moved for judgment on the pleadings, and from an order denying the motion the defendants appealed. The decision below was affirmed. The Court stated as follows (Page 192):

“Were these charges, thus presented, an absolutely privileged communication? Not unless the proceeding before the Police Commissioner was a judicial proceeding. Personally I am inclined to think that such was the case. And if it be contended that it was a civil judicial proceeding, then plaintiff’s rights were interfered with in consequence thereof, for it appears that pending a hearing on said charges, he was suspended from duty without pay, and temporarily disgraced in the Department.” (citing cases).

In any event defendant must take one horn of the dilemma or the other. If the proceedings in which relator was tried was a judicial one, having been instituted maliciously and without probable cause, and plaintiff’s personal and property rights having been interfered with pending the same, an action for malicious prosecution will lie. If it was not a judicial proceeding, then an action for libel will lie. All that we are concerned with at present is whether the complaint states any cause of action.”

This decision was affirmed by the Court of Appeals of New York, 214 N. Y. 665 N. E. 1094. It was followed in other New York cases. See *Black v. Judelson*, 296 N. Y. Sup. 860. See also *Roberts v. Pratt*, 21 N. Y. Sup. (2) 545.

The case of *Bump v. Betts*, a New York case reported in 19 Wendell, 421 decided in 1834, was an action for malicious prosecution, based upon a suit and proceeding by attachment against the plaintiff. The Court states:

“This action lies against any person, who maliciously and without probable cause, prosecuted another, whereby the party prosecuted sustains an injury, either in person, property or reputation.”

A somewhat analogous situation to the circumstances of this case might be found in a situation involving the license of an attorney to practice before the Treasury Department. That Department licenses attorneys to practice, upon application and investigation. If other persons should file false and malicious charges of unethical or illegal practice against such a licensed attorney, resulting in a temporary suspension of license and in formal hearings before the Administrative Board which controls such licenses, could it be argued that the attorney would have no redress against the person making those false charges? The attorney would clearly be injured in his reputation and standing and might conceivably suffer monetary loss as well as mental anguish. Clearly he would be entitled to compensation.

Another somewhat analogous state of facts might result in a situation where a person maliciously and falsely files charges against a member of the Bar, necessitating defense before a Bar grievance committee. Certainly it could not be said that a tort of that character is only libel or slander, and it could not be said that the member of the Bar so proceeded against would not have an action in the nature of an action for malicious prosecution. It is submitted that in any instance where a person is compelled to defend himself before a legally constituted body or agency he has been subjected to a prosecution. Certainly modern concepts of justice would abhor a failure to give redress.

A similar situation could be brought about in cases involving physicians and their right to practice under license.

Counsel for appellants relies upon the argument that his clients did not institute either a civil or a criminal judicial

action against the appellee and that therefore no suit by him will lie. A distinction is attempted to be made in commenting upon the *National Surety Company vs. Page* case, *supra*, by the argument that the proceeding involved there was a judicial proceeding because the Virginia Code provision permits appeals to the courts. In other words, counsel would contend that if the particular type of license involved fell under the provision of Title 20, Sec. 1742, of the D. C. Code, which provides for appeals to the Courts, then the instant case would fall within the rule of *National Surety Company vs. Page*. This is not only a tenuous argument, but presents a clear illustration of "distinction without a difference". There are many instances involving licenses which do not provide for appeals to the Courts. Further, it is pointed out that the mere fact that no appeal from an action of an administrative board is provided by statute or by regulation does not mean that no appeal to the courts can be had. There is well settled law that rulings and actions of any administrative agency or board which are unreasonable, arbitrary, irregular or illegal, are subject to judicial review, and statutes which make provision for appeals from administrative rulings are only declaratory of that law. It is pointed out that the statute giving the Commissioners of the District of Columbia authority to set up a Police Trial Board does not contain any provision for appeal from the findings and decisions of that Board. Could it be said that a member of the Police Department who may be brought to trial before the Police Trial Board upon false and malicious affidavits and charges would not have an action against those filing and making such false affidavits and charges?

While it is not admitted that the false allegations made against the appellee by the appellants were not defamatory in nature, it is contended that the tort of which appellants were guilty does not come within the strict definition of an action for defamation. It has been stated that the test of a defamatory statement "is its tendency to excite against the plaintiff the adverse opinions and feelings of others."

(Salmond on Torts, 7th Ed. 519). The activities of the appellants toward the appellee in this case, of course, were defamatory in character, but they went beyond defamation and were intended to and did result in deprivation of property and other special damages more coincident with malicious prosecution. This is not a case of publication of defamatory matter, but falls more closely within the class involving the filing of charges intended to be acted upon by official bodies to the detriment and damage of the person against whom directed. The situation in the instant case involves more than libel, because libel applies to the "publication" of defamatory matter or harmful falsehoods, and requires a communication. The basis of a libel action is damages for injury to the character in the opinion of others, but can only arise from publication. True, there were defamatory statements made, there were publication and communication in the instant case, but all this was directed toward a definite aim and objective, affirmative action against a particular individual by a public agency. The appellants would not have been satisfied by mere publication, but all the evidence surrounding their actions conclusively shows that they were directing their activities toward a prosecution which they hoped would result in the complete destruction of the appellee in order to serve their own private, personal and selfish ends, and not in the interest of protection to society. Some contention is made by appellants in this case that they acted as they did only to inform the public authorities, and with no intention to harm the appellee. Not only was this issue decided by the jury, but it is well settled law that a defendant in this class of case can defend neither by proving a want of intention to harm the plaintiff nor due care on his part not to harm him.

For similar reasons, the instant case is not one of slander or libel actionable *per se* because charging a crime. Pence was not prosecuted in court for any alleged criminal conduct, and such a prosecution would not have fulfilled the motives of the appellants. It is believed that a fair assumption would be that if the appellants had desired a crim-

inal prosecution of Pence for impersonation, either the appellants or the police officers would have caused the facts to be presented to the prosecuting authorities, and since the same evidence would have been adduced in such a prosecution as was brought out in the trial before the special administrative body which heard Pence's appeal, it would have resulted in an acquittal. In such event, certainly the appellants could not have escaped liability in an action for malicious prosecution. It is respectfully submitted that the charges made by appellants against Pence, with the aims and purposes described, started administrative action in movement, which undoubtedly resulted in more inconvenience, more damage and more severe prosecution than would have been even envisaged by a criminal prosecution for impersonation. The grounds for appeal then appear even more strange and untenable than should be anticipated by any court under any rules of pleading. It is further pointed out that it is not the fear or inconvenience to an innocent person arising from prosecution, but the harm to his reputation from false charges of criminal conduct that constitutes the basis of the rule relating to causes of action for slander or libel actionable *per se*. The instant case is very close to defamation and libel, as well as it is close to the action for "injurious falsehood." In fact, the circumstances here could be said to include all of those things but still not confined thereto. It is more serious than any of these and has characteristics foreign to and more far reaching in their tortious effect. No matter what fine distinction may be attempted, the truth stands out boldly that Pence was subjected to a form of malicious prosecution.

Is it any less a prosecution because it did not take place in a court of law, and is there any less significance in the manner of its instigation because the "process" was lengthy, malicious, self-serving affidavits and unfounded statements, rather than orderly legal process. What does it matter to the one prosecuted that the proceedings in which he defends himself—in a sense litigation more nearly criminal and penal than civil—take place before a board, com-

mission or other administrative body? Because of the nature of the proceedings, i. e., deprivation of license and injury to reputation, a close analogy is drawn to the institution of proceedings of bankruptcy, lunacy, delinquency and contempt, all of which have been held to support an action for malicious prosecution although not criminal in nature. The factual background, (a) employment of Pence, a private detective, to observe for his client, the wife of Melvin, the actions of Melvin and Elna Smith; (b) circumstances under which Melvin and Smith were confronted by Pence and his client; (c) lapse of time after the incident of confronting before appellants made formal charges or complaint; (d) fact that appellants appeared at Police Department at the same time to swear to complaints; (e) wording of complaints, one expressing a desire to "prosecute" Pence; (f) furnishing to Police Department of a copy of Melvin's letter to his attorney, and the contents of that letter; (g) appearance of appellants at a formal hearing and testifying under oath before an administrative board against Pence; (h) continuation of domestic litigation between appellants and Pence's client, and later the marriage of appellants, support the conclusion that appellants, with joint and mutual aims and motives, intended to and did jointly and severally prosecute, instigate and carry on a proceeding against Pence. Whether the proceeding was civil or criminal or near to both, the appellants committed a grievous tort, a redress for which was sought in a Declaration stating the facts, obtained after fair trial by a jury correctly instructed in the applicable law of those facts and the evidence, and which he should be permitted to retain. It may well be that in the methods followed in this case a citizen is prosecuted more akin to persecution than if he were unjustifiably made the defendant in a public and judicial prosecution, where he would at least be protected by public prosecuting authorities or by officers of courts mindful of compliance with rules of fair play.

(b) Damages:

Injury to reputation and mental pain and suffering are proper elements of damage. Black v. Canadian Pacific Railroad, decided in the United States District Court for the Western District of New York, 218 Fed. 239, was a suit for malicious prosecution. On the question of damages the Court stated page 244:

“The elements of compensatory damage include, among other things, loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering, and decrease in earning capacity. See 26 Cyc (Ed. 1907) page 62 et seq. This case belongs to a class where the jury is peculiarly the proper judge of the amount of damages, and, before a verdict may be set aside or remitted in part, the Court under well known rules must be satisfied that the result was influenced by passion or prejudice, or that the amount was grossly disproportionate to the wrong inflicted.”

“In the case at bar, two of the important elements of damage are mental suffering and injury to reputation. Upon a set of facts such as were disclosed, can it be said that the mental distress of an intelligent, industrious and honest man earning \$1,200 per annum is to be measured by a standard different than would apply to a man of larger earning capacity, *or can anyone tell with exactitude the extent to which a man's reputation is injured by a wrongful prosecution*, and in such a way, among other things as to interfere anonymously, as it were, with his opportunity to earn a living in his accustomed vocation or walk of life.” (Italics supplied)

Clark vs. Associated Retail Credit men of Washington, 70 App. D. C. 183. This was a suit for damages caused by the defendant in writing threatening and annoying collection letters to the plaintiff. This Court sustained the action, and approved a broad principle that one who, without just cause or excuse, and beyond all the bounds of decency, persistently causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is

subject to liability in damages for such mental and emotional disturbances even though no demonstrable physical consequences actually caused physical harm. In the instant case the mental distress and anxiety suffered by the appellee also had some physical reactions and could have easily caused great physical harm.

In the case of *Bergeron vs. Goldman*, 64 F. (2d) 917, a suit for malicious prosecution, the United States Circuit Court of Appeals for the Fifth Circuit, in dealing with the question of damages, stated:

“* * * in an action for malicious prosecution a plaintiff is not confined in his recovery to the actual loss in dollars and cents he has suffered. In such cases pecuniary loss, such as injury to reputation, humiliation and embarrassment, are often the chief items of recovery.”

If the instant suit is properly in the class of malicious prosecution, then clearly the instructions of the Court on the question of damages to reputation and for mental anguish were proper.

Leyman v. Short, decided by the Court of Appeals of Kentucky, 1926, 283 S. W. 96. The Court held that in an action for malicious prosecution, mental pain and suffering is an element of actual damages, and whatever legitimately tends to show the character and extent of such suffering is admissible in evidence; also that the defendant is responsible for the damages suffered by the plaintiff which are the direct results of the wrong complained of.

In the *Surety Company vs. Page* case, *supra*, the declaration had claimed damages to business and reputation, and damages to his feelings. A demurrer to that declaration was overruled.

In all libel and slander suits the elements of damage include mental pain, distress and humiliation, and damages to reputation. See *Washington Herald Company vs. Berry*, 41 App. D. C. 322; also the case of *Steamboat Company vs.*

Davis, 12 Appt. D. C. 306; also *Washington Times Co. v. Downey*, 26 App. D. C. 258.

In the case of *Peckham vs. Union Finance Co.*, 60 App. D. C. 104, cited in appellants' brief, the plaintiff could not recover in an action for malicious prosecution, because the civil suit of which she complained had not sought any special relief against her, did not in any way injure her reputation or interfere with her property, or place her in any situation similar to the one faced by Pence in his proceedings. The decision in that case is not in any way in conflict with the opinion of the Court below in this case.

In the case of *Auerbach vs. Freeman*, 43 App. D. C. 176, this Court held there was no basis for an action of malicious prosecution, for the reason that there was no evidence that there had been a prosecution. The plaintiff had been arrested and threatened with prosecution. He may have had an action for false arrest or imprisonment, but there had been no proceeding instituted of any kind.

CONCLUSION.

The record clearly shows that the appellee was lawfully engaged in the pursuit of his occupation, under license from the Commissioners of the District of Columbia; that such license must have approval of the Police Department; that the appellants falsely and maliciously charged, in sworn complaint to the Police Department, that appellee was guilty of unethical conduct, and in fact charged him with committing the crime of false impersonation; that as the direct result, appellee was denied a license to engage in his accustomed occupation, was compelled to appeal that denial and appear before a formal hearing, was exonerated of the charge, suffered monetary loss, damages to reputation, and mental anguish. The record further shows clearly that the trial court properly submitted the case to the jury upon all the issues as framed by the pleadings and the testimony, properly refused to direct a verdict for the ap-

pellants, and properly denied the motion to set aside the verdict and enter judgment for the appellants.

It is respectfully submitted that the verdict and judgment below should be affirmed.

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